Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1746

ALFRED FAYER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

ALFRED FAYER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Alfred Fayer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered on March 27, 1978, affirming his conviction for violations of 18 U.S.C. § 1623.

Opinion Below

The opinion of the Court of Appeals affirming petitioner's conviction has not yet been reported and appears at pages 1a-11a in the Appendix to this petition.

Jurisdiction

The opinion and judgment of the Court of Appeals was entered on March 27, 1978 (Appendix, p. 12a), and on May 10, 1978, the Court of Appeals denied a timely petition for rehearing (App. p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

Amendment V of the United States Constitution provides in pertinent part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"

Questions Presented

1. Does not the constitutional prohibition against Double Jeopardy protect a federal criminal defendant from being re-prosecuted who, after first being acquitted on the basis of his testimony at a former trial, is indicted for the statutory equivalent of perjury and convicted at a second trial where the identical issues were relitigated on the identical and no significantly additional evidence?

2. May the constitutional protection against Double Jeopardy be waived without a finding of the intentional relinquishment of a known right, where the issue was raised in the trial court on three counts of a four count indictment, and the issue fully briefed on direct appeal as to all four counts?

Statement

Petitioner a member of the Bar for 35 years, stood trial on February, 1975 on two indictments, consolidated for trial; one alleging the aiding and abetting of the at-

tempted bribery of a witness (18 U.S.C. § 201(d)) and the other alleging obstruction of justice (18 U.S.C. § 1503).

The two indictments represented the then culmination of an extraordinary prosecutorial effort against petitioner. Three years earlier, Mr. Fayer was named as a defendant in nine indictments. He was charged with one count of conspiracy in each of the nine indictments and in one of them was additionally charged with aiding and abetting the bribery of a Government employee. Two months later, all nine indictments were dismissed by the prosecution and petitioner was charged in yet an additional indictment with a single count of bribery of a Government employee. In December, 1974, two months prior to the commencement of the trial petitioner was again indicted, this time for obstruction of justice.

All of the eleven indictments centered about and were concerned solely with a single one and a half hour tape-recorded conversation which took place on February 9, 1972 which petitioner attended as a lawyer in response to a request to provide legal advice.

In all, the prosecution of Mr. Fayer from March, 1972 until February, 1975 involved eleven indictments of which nine were dismissed by the prosecution on its own motion and, as described below, two of which resulted in acquittals.

Petitioner waived trial by jury. The trial judge before whom this case was tried acquitted the petitioner of all charges, making specific findings of fact crediting petitioner's testimony. His findings are set forth in their entirety in Appendix pp. 14a-32a to this petition. Specifically, the court credited the defendant's testimony:

> " • • • But the Court must find a reasonable doubt *based upon the testimony of the defendant himself* that he truly believed the Bernsteins' innocence and that he did not understand the nature of the trans-

action as one to pay Goodwin for not testifying. (App. 16a)

• • •

"• • • I have decided that under no view of the law and the facts can I determine beyond a reasonable doubt that the defendant is guilty. There is a reasonable doubt necessarily *because I must and do credit the defendant's testimony with respect to what the Bernsteins said to him.* It is fully consistent with what I heard on the tapes and it's consistent with the way the Bernsteins apparently generally manipulated people." (App. 26a)

Following the acquittal, the prosecution filed notices of appeal from both judgments of acquittal. It withdrew its appeal on the bribery charge, but prosecuted the appeal from the acquittal of the obstruction of justice charge. On September 24, 1975, the Court of Appeals for the Second Circuit affirmed the judgment of acquittal, holding in substance that the acquittal was not appealable by the prosecution. *United States* v. *Fayer,* 523 F.2d 661 (2d Cir. 1975).

Approximately six months later, the prosecution indicted the petitioner for a twelfth time, this time charging in four counts that Mr. Fayer made material false statements in his testimony during the trial at which he was acquitted (18 U.S.C. § 1623)

Again, the entire indictment centered about the meaning of statements by petitioner and others at the February 9, 1972 tape-recorded conversation.

Petitioner stood trial on the false declarations indictment and in spite of the earlier acquittal, was convicted by the jury on June 22, 1977.

The evidence introduced by the prosecution at the first and second trials was essentially identical. Both trials were concerned with a single conversation on February 9,

1972 attended by petitioner, Rose and Harry Bernstein—principals of Eastern Service Corporation, an approved Federal Housing Administration (FHA) lender and client of petitioner's—and Edward Goodwin—a corrupt F.H.A. employee who, unbeknownst to the others, was cooperating with the Government and wearing a recording device throughout the conversation. The theory of the prosecution in the first trial was that petitioner aided and abetted the Bernsteins—who at the time were targets of an ongoing grand jury investigation into F.H.A. corruption—in offering free legal services and a job to Goodwin with the intent of influencing his testimony before the grand jury, and that petitioner corruptly advised Goodwin to claim his constitutional privilege against self-incrimination before the grand jury. The prosecution's proof consisted of the testimony of Goodwin and three tape recorded conversations between the various parties, including that of February 9—the only one involving petitioner. The central issue for the court to decide was what petitioner meant by his statements during the February 9 conversation. Petitioner testified in his own defense and the judge credited his testimony in material respects. At the conclusion of the trial, the court acquitted petitioner on both charges. Crediting his denial of knowledge concerning the Bernsteins' guilt, the court specifically found that (1) he was ignorant of the bribe relationship between the Bernsteins and Goodwin and truly believed in their innocence; (2) he did not, therefore, knowingly participate in the offer of free legal services and a job; (3) he in good faith believed Goodwin wanted his advice as an attorney; and (4) he did not corruptly endeavor to influence Goodwin to remain silent before the grand jury and take the Fifth Amendment.

The central issue at the perjury trial was identical to that in the first trial. Each of the four counts of false declarations centered about petitioner's explanation of the meaning of his statements during the February 9 conversation. Moreover, there was no additional materially dif-

ferent evidence introduced at the second trial which was not available to the prosecution at the first trial. It relied at the second trial, as it had at the first trial, upon Goodwin's testimony and the tape-recorded conversations.

Finally, those portions of petitioner's testimony upon which the prosecution based its perjury indictment had already been found credible by one trier of fact or necessarily formed the basis for the prior judgment of acquittal. Thus, where Count One charges petitioner with lying when he denied having endeavored to influence Goodwin not to testify before the grand jury, the first trier of fact had specifically found such denials credible and had acquitted petitioner on that identical issue; where Counts Two and Three charge falsity in his denial of having discussed on February 9 accusations and allegations that the Bernsteins had paid bribes to Goodwin, the first trier of fact had specifically found that he was ignorant of the bribery relationship and truly believed in the Bernsteins' innocence; finally, where Count Four charges falsity in his explanation that the remark "Please stay out of it, please" had been addressed to Mrs. Bernstein to keep her from interrupting the conversation rather than to Goodwin in an effort to influence his testimony, the first trier of fact had rejected that argument in acquitting him of the obstruction of justice charge.

Prior to imposition of sentence on the false declarations conviction, the trial judge entertained petitioner's Rule 29 motion for a judgment of acquittal on the ground, *inter alia*, that conviction on three of the four Counts was barred by double jeopardy. On appeal, the Court of Appeals, narrowly construing the findings made in petitioner's favor by the first trier of fact, concluded there was no constitutional bar by virtue of the prior acquittal. It declined, however, to rule on the collateral estoppel claim with respect to the fourth count, stating in its Opinion that petitioner had only raised the constitutional issue with respect to the first three

counts. Since petitioner had challenged on double jeopardy grounds all four counts on appeal, he sought—but was denied—a petition for rehearing to correct the court's error.

Reasons for Granting the Writ

I.

The interest in finality of acquittals has been described as "• • • the most fundamental rule in the history of double jeopardy jurisprudence • • •". *United States* v. *Martin Linen Supply Co.*, 97 S.Ct. 1349, 1354 (1977). A second prosecution "• • • increases the financial and emotional burden of the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. • • • Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona* v. *Washington*, No. 76-1168, February 22, 1978, 98 S.Ct. 824, 829-30 (1978).

The values underlying the prohibition against successive prosecutions was succinctly set forth by this Court in *Greene* v. *United States*, 355 U.S. 184, 187-88 (1957):

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Petitioner's case involves a transgression of all of these values.

This Court has recently expressed a substantial interest in seeing that unresolved issues surrounding the pro-

tection against double jeopardy are decided. Last Term, the Court decided nine double jeopardy cases.* This Term (1977-1978) the Court heard argument in eight cases involving double jeopardy,** and has decided two of the cases as of the filing of this Petition. *Arizona* v. *Washington, supra; United States* v. *Wheeler,* No. 76-1629, March 22, 1978, 98 S.Ct. 1079 (1978).

However, none of these cases involve the issue presented by this petition, namely, the impact of the double jeopardy clause upon a reprosecution for perjury on the same evidence following an earlier acquittal on a substantive offense. Indeed, although collateral estoppel has existed as a rule of criminal procedure since 1916, *United States* v. *Oppenheimer,* 242 U.S. 85, this Court has never decided the rule which should govern prosecutions for perjury following an acquittal for a substantive offense. The only case which has even alluded to the issue was twenty-seven years ago, *United States* v. *Williams,* 341 U.S. 58 (1951) where the Court stated that collateral estoppel *could* be applicable in a subsequent perjury prosecution, but decided that the issue the defendant sought to foreclose had not necessarily been determined in the previous trial. *id.* at 63-64.

Nor did this Court's decision in *Ashe* v. *Swenson,* 397 U.S. 436 (1970)—the Court's last full declaration of col-

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* *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Jeffers* v. *United States,* 432 U.S. 137 (1977); *Lee* v. *United States,* 432 U.S. 23 (1977); *Abney* v. *United States,* 431 U.S. 651 (1977); *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564 (1977); *United States* v. *Kopp,* 429 U.S. 121 (1976) (per curiam); *United States* v. *Sanford,* 429 U.S. 14 (1976); *United States* v. *Rose,* 429 U.S. 5 (1976) (per curiam); *United States* v. *Morrison,* 429 U.S. 1 (1976) (per curiam).

** *Sanabria* v. *United States,* No. 76-1040; *Arizona* v. *Washington,* No. 76-1168; *Crist* v. *Cline,* No. 76-1200; *United States* v. *Scott,* No. 76-1382; *United States* v. *Wheeler,* No. 76-1629; *Burks* v. *United States,* No. 76-6528; *Greene* v. *Massey,* No. 76-6617; *Swisher* v. *Brady,* No. 77-653.

lateral estoppel and the doube jeopardy provision*—consider the issues raised by a subsequent perjury prosecution, especially the chilling effect which such a prosecution on the same evidence can have on the exercise of the right of a defendant to testify in his own behalf. It should clearly be the goal of every judicial system to have the defendant testify. In all civil law jurisdictions, the defendant is not sworn when he testifies—undoubtedly to avoid the possibility that the threat of a subsequent perjury prosecution on the same evidence would prevent the defendant from testifying.

In all events, the Courts of Appeals are in conflict on the issue and the controlling impact of this Court's decision in *Ashe* v. *Swenson,* 397 U.S. 436 (1970). The Second Circuit, from which petitioner's case comes, has given an extremely restrictive reading to *Ashe* and has never reversed a conviction on collateral estoppel grounds since the *Ashe* decision. See, *e.g., United States* v. *Gugliaro,* 501 F.2d 68, 70-72 (2d Cir. 1974); *United States* v. *Tramunti,* 500 F.2d 1334, 1346-49 (2d Cir.), *cert. denied* 419 U.S. 1079 (1974).

On the other hand, the Fourth and Ninth Circuits have interpreted *Ashe* as we believe this Court intended it to be. *United States* v. *Nash,* 447 F.2d 82 (4th Cir. 1971); *United States* v. *Hernandez,* No. 77-2451, February 27, 1978, slip opinion 621-26. Both *Nash* and *Hernandez* involved reprosecutions for perjury following an acquittal on the substantive offense. In both, the convictions were reversed. Indeed, Judge Hufstedler in *Hernandez, supra,* was prompted to comment on the clear division on the issue between the Second and Ninth Circuits (slip opinion 625-26, n.5):

"We are aware that the Second Circuit has given an

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* In *Simpson* v. *Florida,* 403 U.S. 384 (1971); *Harris* v. *Washington,* 404 U.S. 55 (1971) and *Turner* v. *Arkansas,* 407 U.S. 366 (1972) this Court reaffirmed the principles of *Ashe* v. *Swenson, supra,* in *per curiam* opinions.

extremely restrictive reading of *Ashe*. (*E.g., United States* v. *Seijo* (2d Cir. 1976) 537 F.2d 694; *United States* v. *Cala* (2d Cir. 1975) 521 F.2d 605; *United States* v. *Cioffi* (2d Cir. 1973) 487 F.2d 492.) These cases can be factually distinguished from the case at bar, but, more important, the rationale of these cases cannot be squared with the teachings of the United States Supreme Court in *Ashe* v. *Swenson, supra,* as reaffirmed in *Harris* v. *Washington* (1971) 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212; *Turner* v. *Arkansas* (1972) 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798."

The possibility that an overzealous prosecutor may utilize a perjury prosecution or its statutory counterpart to retry issues already litigated in an acquitted defendant's favor has been recognized as posing a danger to the continued vitality of the protection against double jeopardy. It is *always* theoretically *possible* to reprosecute an acquitted defendant under the guise of perjury (or its statutory equivalent, on the basis of his testimony at the former trial. If it were permissible to do so, the finality which the Fifth Amendment requires be accorded to acquittals would have little meaning. Defendants could obviously avoid this possibility by not testifying, but this would be contrary to the goals of the criminal justice system, namely, to encourage all persons with knowledge of the facts to testify.

To allow such subsequent perjury convictions to stand would run counter to at least three of the policy underpinnings which have been held embodied in the Fifth Amendment guarantee against double jeopardy. First, is the fear that successive prosecutions may result in the conviction of an innocent man—a fear, we believe, to be a substantial one in this case where the prior acquittal resulted from an adjudication by an experienced federal judge following a non-jury trial. Second, the danger of prosecutorial harassment of a defendant by subjecting him to repetitive prosecutions—a danger fully justified in this

case since Mr. Fayer has been subjected to twelve indictments (nine of which were dismissed by the prosecution itself), an acquittal on two indictments, two trials, one conviction, and two appeals—all arising from the single conversation on February 9, 1972. Third, the legitimate reliance of a defendant upon a prior adjudication, whether or not correctly decided.

Reprosecution for perjury following acquittal is a growing prosecutorial practice frequently utilized to retry a defendant on the same evidence. It is convenient, for it requires almost no additional prosecutorial effort. Such prosecutions almost invariably amount to no more than a relitigation of the evidence presented at the prior trial. Unless this Court establishes principles to govern such reprosecutions, this practice will increase even further, especially in the courts of the Second Circuit. As examples, we point not only to the case involving petitioner, but also to such recent cases of *United States* v. *Tramunti,* 500 F.2d 1334, 1346-49 (2d Cir. 1974) *cert. denied* 419 U.S. 1079 (1974); *United States* v. *Gugliaro,* 501 F.2d 68, 70-72 (2d Cir. 1974).

This case is most appropriate for the establishment of clear guidelines. Here, there is no general jury verdict, but rather the specific findings of a federal judge at the first trial. These specific findings credited the defendant's testimony at the first trial. The evidence at the second trial was identical to that at the first. There was no evidence which was not available to the prosecution at the first trial. Indeed, in this respect this case is even stronger than *United States* v. *Nash, supra,* and *United States* v. *Hernandez, supra,* where the prosecution had additional evidence at the second trial. The central issue at the first trial of petitioner was simply what he meant by his statements during the February 9 conversation. On the basis of all the evidence there adduced, an experienced federal judge acquitted petitioner.

The central issue at the second trial was identical. Each of the counts of perjury centered about Mr. Fayer's explantion of his meaning of statements he made during the February 9 conversation.

Yet, in spite of this congruence of issues, the Court of Appeals, applying an extremely restrictive reading of *Ashe* v. *Swenson, supra,* affirmed the conviction. It condoned the prosecution's practice of slicing into successively smaller portions for purposes of reprosecution conduct which, when judged in its entirety, resulted in an acquittal. The rationale of its decision cannot be squared with the teachings of this Court in *Ashe.*

II

The issue of collateral estoppel with respect to the fourth count was clearly raised on appeal. The Court of Appeals incorrectly stated that the issue was raised only with respect to the first three counts. It refused to alter its opinion on a timely petition for rehearing. We must assume that the Circuit Court at least impliedly held that the issue on count four was waived because not raised in the trial court.

The Courts of Appeals have taken contrary positions on the effect of the failure to raise a claim of double jeopardy or collateral estoppel in the district court on direct review from the conviction. As Judge Friendly said in *United States ex rel. DiGiangiemo* v. *Regan,* 528 F. 2d 1262, 1268 (2d Cir. 1975), *cert. denied* 426 U.S. 950 (1976): "* * * these decisions are not consistent," the Third and Seventh Circuits have applied the "intentional relinquishment of a known right" standard of *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). In *United States* v. *Anderson,* 514 F.2d 583, 586 (7th Cir. 1975), the Seventh Circuit permitted a claim of double jeopardy to be raised for the first time on appeal since it did not "find an 'intentional relinquishment' of a

'known right'." In *Government of the Virgin Islands* v. *Smith,* 445 F.2d 1089, 1094 (3rd Cir. 1971), the Third Circuit on its own raised and found meritorious a double jeopardy claim although counsel had not raised the issue either at trial or on appeal.

Other Circuits have found waiver without requiring a finding of intentional relinquishment. In *United States* v. *Conley,* 503 F.2d 520, 521 (8th Cir. 1974), the court refused to consider a defense of former jeopardy raised for the first time on appeal; the theory being that " 'constitutional immunity from double jeopardy is a personal right which if not affirmatively pleaded by the defendant at the time of trial will be regarded as waived'." Smiliar positions have been taken by other Circuits. *United States* v. *Scott,* 150 U.S. App. D.C. 323, 464 F.2d 832, 833 (D.C. Cir. 1972); *United States* v. *Buonomo,* 441 F.2d 922, 924-25 (7th Cir.), *cert. denied* 404 U.S. 845 (1971) (raising defense on motion for new trial not timely); *United States* v. *Friedland,* 391 F.2d 378, 381-82 (2d Cir. 1968), *cert. denied,* 404 U.S. 867 (1971); but compare *Rollerson* v. *United States,* 132 U.S. App. D.C. 10, 405 F.2d 1078 (1968) where originally a double jeopardy claim was held not to be cognizable for the first time in a proceeding under 28 U.S.C. § 2255, absent an explanation of why it was not raised earlier. On certiorari, 394 U.S. 575 (1969), this Court vacated and remanded the case for "further consideration in light of *Kaufman* v. *United States,* 394 U.S. 217." On remand the district court found that "there was never any intentional relinquishment or abandonment of a known right", and then proceeded to decide that on the merits the petitioner's claim lacked validity. *United States* v. *Rollerson,* 308 F.Supp. 1014 (D.D.C. 1970). On appeal, 449 F.2d 1000 (1971), the court affirmed on the merits without further discussion of the procedural issue. Also, compare *United States* v. *Young,* 503 F.2d 1072 (3d Cir. 1974) (recognizing claim raised on eleventh day of trial discretionary with district court).

This Court has never specifically ruled on the issue, either under the double jeopardy or due process clauses. It has, however, indicated that the intentional relinquishment standard should apply. In *Menna* v. *New York,* 423 U.S. 61 (1975), the Court held that once a defendant has claimed former jeopardy and the claim has been denied, a subsequent plea of guilty does not waive the claim:

> "Where the State is precluded by the United States Constitution from hailing a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."

In *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 237-38 (1973) this Court said in *dicta* that "the standard of a knowing and intelligent waiver • • • has applied to • • • the right to be free from twice being placed in jeopardy", citing *Green* v. *United States,* 355 U.S. 184 (1957). Compare *Jeffers* v. *United States,* 432 U.S. 137 (1977).

There is clearly a pressing need for this Court to establish the standard to be applied to possible waiver of as important a constitutional right as that to be free from constitutionally impermissible reprosecutions. Petitioner's case provides the court with such an opportunity.

To find waiver simply because with respect to one of four counts the issue was not raised in the district court would not further the basic policy considerations underlying the constitutional protection against double jeopardy. We have outlined three of those policy considerations above; the fear that relitigation may result in the conviction of an innocent man; legitimate reliance upon a prior adjudication; and the danger of prosecutorial harassment. None of these policy considerations would be furthered by finding waiver.

The only policy consideration even arguably supportable here is the desire to avoid the effort of all concerned in

relitigating a matter once determined. However in this case, even this policy consideration is not totally applicable since a full consideration of the issue was equally available to both the District Court and the Court of Appeals. There was no hearing necessary, all of the proof at both the first and second trials was available. The only failing, hardly sufficient for the waiver of a constitutional right, was that one of four counts was excluded by trial counsel from his collateral estoppel motion prior to imposition of sentence. If this technical omission is sufficient for waiver, as apparently the Court of Appeals held, then there is little left to the constitutional protection against double jeopardy. Therefore, waiver as applied to the facts of this case would on balance not substantially further the policies underlying the Fifth Amendment's provision prohibiting double jeopardy.

CONCLUSION

This petition for a writ of certiorari should be granted.

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June, 1978

APPENDIX

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 456 September Term, 1977

(Argued December 15, 1977 Decided March 27, 1978)

Docket No. 77-1389

UNITED STATES OF AMERICA,

Appellee,

v.

ALFRED FAYER,

Appellant.

Before: OAKES and VAN GRAAFEILAND, *Circuit Judges,* and BARTELS,* *District Judge*

Appeal from a judgment following a jury trial in the United States District Court for the Eastern District of New York before Mishler, *Ch. J.*, convicting appellant of four counts of perjury.

Affirmed.

OTTO G. OBERMAIER, New York, N.Y.
(Martin, Obermaier & Morvillo
Carolyn H. Henneman, of counsel)
for Appellant.

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* Honorable John R. Bartels, Senior District Judge of the United States District Court for the Eastern District of New York, sitting by designation.

RONALD DEPETRIS, New York, N.Y.
Special Assistant to the United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York; Harvey M. Stone and David S. Gould, Assistant United States Attorneys, of counsel)
for Appellee.

VAN GRAAFEILAND, *Circuit Judge:*

This is an appeal from a judgment convicting appellant on four counts of perjury. It is the last chapter of the sad story of a lawyer whose zeal on behalf of his clients led him into areas of such doubtful propriety that he himself was charged with complicity in his clients' wrongdoing. Although he successfully defended himself against these accusations, the jury below found that he perjured himself in the process. Finding no reversible error, we affirm the judgment of conviction.

The clients' misdeeds are described in *United States* v. *Bernstein,* 533 F.2d 775 (2d Cir.), *cert. denied,* 429 U.S. 998 (1976), and the lawyer's involvement is discussed in *United States* v. *Fayer,* 523 F.2d 661 (2d Cir. 1975). A brief recapitulation will suffice. The clients, Harry and Rose Bernstein and their wholly owned company, Eastern Service Corporation, were convicted of securing false F.H.A. appraisals for mortgages which they owned and serviced by bribing F.H.A. appraisers, one of whom was Edward Goodwin. Prior to indictment, the Bernsteins and appellant Fayer met with Goodwin and attempted to convince him that he should not give any information to the grand jury which was investigating the Bernsteins' activities. Unbeknown to them, Goodwin had already

agreed to cooperate with the Government, and the entire conversation was tape-recorded by a device concealed on Goodwin's person.

A fair reading of the transcript of the recorded conversation establishes clearly that both the Bernsteins and Fayer repeatedly urged Goodwin not to talk before the grand jury. They also urged Goodwin to discharge his attorney, who had recommended that Goodwin cooperate with the Government, and replace him with another attorney who would be paid by the Bernsteins. Finally, the Bernsteins, with Fayer's apparent approval, offered Goodwin a job in their Florida office if his refusal to cooperate cost him his F.H.A. job.

Fayer was originally indicted for wrongfully endeavoring to influence a witness, 18 U.S.C. § 1503, and for aiding and abetting in the attempted bribery of the witness, 18 U.S.C. §§ 2 and 201(d). Following a non-jury trial before Judge Weinstein in the Eastern District of New York, Fayer was acquitted on both counts. The basis for Judge Weinstein's holding on the first count was that, although Fayer was motivated in part by his desire to protect the Bernsteins, there was a substantial doubt as to whether he was not also attempting to advise Goodwin as a lawyer. With regard to the second count, Judge Weinstein found that, although Fayer "did aid and abet the Bernsteins" and that it was difficult to believe that Fayer did not know that the Bernsteins "were using him to aid and abet them in their scheme", a reasonable doubt nonetheless existed as to whether Fayer acted with the wilful intent to corrupt.[1] Appellant was subsequently indicted again, this time on four counts of perjury.

Appellant contends that his convictions on three of the four perjury counts must be reversed because he was immune from prosecution on these counts under the doctrine of collateral estoppel. His post-trial motion addressed to

the fourth count specifically excluded collateral estoppel as a ground for dismissal.[2] Because this count stands separate and apart in this respect, it will be discussed first.

COUNT IV

The transcript of the recorded conversation shows that in attempting to convince Goodwin to discharge his attorney, the Bernsteins and Fayer made the following statements:

> Fayer: I would say to your friend. And this is the right thing, he spent a little bit of his time. I'd give him a check. I don't know how much time he spent. A hundred, two hundred dollars. Whatever it is. Give him a check. Tell him you'll think it over and so forth, and just sit tight. If you're called at that point . . .
>
> Rose Bernstein: But tell him not to do any investigating (inaudible).
>
> Harry Bernstein: Don't do any investigating on his own, don't do anything. Just don't worry.
>
> Fayer: Please stay out of it. Please.

During the first trial, Judge Weinstein stated to Fayer that there were numerous references in the transcript to having Goodwin's attorney stop an investigation. And then, referring to the above quoted statement by Fayer, Judge Weinstein asked, "Whom were you addressing this remark to, Mr. Fayer?" Appellant's reply was, " 'Please stay out of it' was Rose Bernstein. She had no right to tell him not to do any investigation." Count IV of the perjury indictment, after reciting the foregoing facts, charged that appellant's declarations were false in that appellant was addressing the remark "Please stay out of it" to Goodwin to tell his attorney and was not addressing it to Rose Bernstein.

During the prosecutor's summation, he told the jury that after listening to the playing of the tape, his interpretation of what Fayer had said was "Please stay out of it completely." Upon objection by appellant's counsel, based upon a prior stipulation as to the accuracy of the transcript, the Court stated that the tape was in evidence and the jury could be asked to listen and make its own determination as to the actual conversation. Appellant now contends, first, that the prosecutor's statement amounted to an impermissible amendment of the indictment, and second, that the alleged misstatement was not material. We disagree as to both contentions.

The gravamen of the perjury charge in count IV was the response made by appellant when the court asked, "Whom were you addressing this remark to, Mr. Fayer?" Appellant's response was " 'Please stay out of it' was Rose Bernstein." If the remark was not addressed to Rose Bernstein, this answer was clearly false. Remarks which preceded this answer were included in the indictment merely to place the perjurious statement in context. *See United States* v. *Bonacorsa,* 528 F.2d 1218, 1221 (2d Cir.), *cert. denied,* 426 U.S. 935 (1976). Whether a particular word in a contextual remark was "please" or "completely" is unimportant on the facts of this case. *See United States* v. *McGrath,* 558 F.2d 1102, 1105 (2d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3516 (Feb. 21, 1978); *United States* v. *Cirami,* 510 F.2d 69, 72-73 (2d Cir.), *cert. denied,* 421 U.S. 964 (1975).

The district court was correct in finding that this misstatement was material. The test of materiality is whether the false testimony was capable of influencing the fact finder in deciding the issues before him. *United States* v. *Gugliaro,* 501 F.2d 68, 71 (2d Cir. 1974). One of the issues to be decided by Judge Weinstein was whether Fayer knew that the Bernsteins had been guilty of wrongdoing. *Fayer,* 523 F.2d at 664. Fayer's urging that Goodwin's lawyer be instructed to stay out of the matter was an indication that

Fayer knew that the Bernsteins had been guilty of criminal conduct and that further investigation by Goodwin's attorney might uncover it.

Collateral Estoppel and the Remaining Counts

The acquittal of a defendant following a trial on criminal charges does not bar his subsequent conviction for perjury committed during the course of the trial. *Gugliaro,* 501 F.2d at 70-71; *United States* v. *Gremillion,* 464 F.2d 901, 906 (5th Cir.) *cert. denied,* 409 U.S. 1085 (1972); *Adams* v. *United States,* 287 F.2d 701 (5th Cir. 1961). "To hold otherwise . . . would be to put a premium on perjury and to make immunity from punishment for perjury rest on success in commission of the crime." 70 C.J.S. Perjury § 26 at 492 (footnotes omitted).

It is only when an issue of ultimate fact or an element essential to conviction has once been determined by a final judgment in a criminal case that the same issue cannot be relitigated. *United States* v. *Cala,* 521 F.2d 605, 607-08 (2d Cir. 1975); *Gugliaro,* 501 F.2d at 70. Moreover, the burden is on the defendant to establish that the verdict in the prior trial necessarily determined in his favor the issue which he now contends should not be considered. *United States* v. *King,* Dkt. No. 77-1221, slip op. 65, 67 (2d Cir. Oct. 7, 1977). Because Judge Weinstein made specific findings, it is possible to determine with some accuracy the factors which entered into his decision.

Count I

The first count charged appellant with perjury for testifying falsely that he had advised Goodwin not to cooperate with the F.B.I. when he had in fact advised Goodwin not to testify before the grand jury. Corrupt advice

under 18 U.S.C. § 1503 must relate to an investigation by the grand jury, not the F.B.I. *United States* v. *Ryan,* 455 F.2d 728, 733 (9th Cir. 1972). Our reading of the transcribed conversation at the time we decided *Fayer,* 523 F.2d at 662, satisfied us that appellant was endeavoring to convince Goodwin not to go before the grand jury and not to talk. Our re-reading of the transcript on this appeal has fortified us in this conviction. More importantly, Judge Weinstein made this specific finding on the first trial.

Appellant was not acquitted by Judge Weinstein because his advice related to the F.B.I., but because there was substantial doubt as to whether it was given with a corrupt motive. The facts determinative of the issue raised by count I were found against appellant on the first trial, and the government was not estopped from prosecuting him on this charge on the second trial. *United States* v. *Williams,* 341 U.S. 58, 64 n.3 (1951).

Count II

At the conclusion of the first trial, Judge Weinstein stated that he found "a reasonable doubt based upon the testimony of the defendant himself that he truly believed the Bernsteins' innocence." Count II charges that appellant testified fasely when in reply to a question by the court he denied that the parties to the recorded conversation were discussing "accusations and allegations" that the Bernsteins had paid bribes to Goodwin.

It is clear from the transcript that the parties were discussing "accusations and allegations" that Goodwin took money from the Bernsteins.[3] That appellant might have believed the Bernsteins innocent of these charges did not indicate in the slightest that the accusations had not been made. Indeed, if Judge Weinstein was not convinced

that the Bernsteins had been accused of bribery, his finding that Fayer believed them to be innocent was meaningless. Innocent of what? The Bernsteins were not being accused of murder or assault; they were being accused of bribery. Judge Weinstein's finding that Fayer believed them to be innocent does not gainsay that the accusation was made and discussed; to the contrary, it confirms it. There was no estoppel barring appellant's conviction on count II.

COUNT III

During the course of the recorded conversation, Harry Bernstein said to Goodwin, "If you say anything, it blows everything." In response to questions by Judge Weinstein, Fayer testified that he believed this to mean that if Goodwin said anything, he, Goodwin, would be finished and that Bernstein was not referring to himself when he made this statement. Count III charges that this answer was false because Fayer knew and believed that Bernstein was referring to himself, his wife and his corporation.

The jury below concluded the obvious—that Bernstein was referring to himself and that Fayer knew it. Whether they were estopped from reaching this conclusion by Judge Weinstein's findings on the first trial is not so clear. Judge Weinstein found that one of Fayer's motives in talking to Goodwin was "to protect the Bernsteins." At the same time, however, he found that there was a reasonable doubt as to whether Fayer believed the Bernsteins to be innocent. It is difficult to reconcile these two findings unless the first is interpreted to mean that Fayer was attempting to assist the Bernsteins in avoiding indictment, not conviction. So construed, there is nothing in Judge Weinstein's findings which estopped the Government from prosecuting Fayer on count III, and the district court did not err in so holding.[4]

APPELLANT'S OTHER CONTENTIONS

Appellant asserts error because of several evidentiary rulings by the trial court, but we find no basis in them for reversal. Goodwin was permitted to testify concerning his prior relationship with the Bernsteins and about a conversation he had with them. A recording of this conversation was admitted into evidence. This proof, which the jury was permitted to consider under appropriate limiting instructions, was properly received as background for the recorded conversation which was in issue. *United States* v. *Ruggiero,* 472 F.2d 599, 607 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973). Moreover, there was evidence that appellant knew what had transpired during the prior recorded conversation and it therefore bore directly on the issue of his intent.

The trial court did not abuse its discretion in allowing testimony by Goodwin as to what several statements by Fayer and Harry Bernstein meant to him. *United States* v. *Cioffi,* 493 F.2d 1111, 1116 (2d Cir.), *cert. denied,* 419, 917 (1974); *Wiley* v. *United States,* 257 F.2d 900, 908 (8th Cir. 1958). The court instructed the jury that the issue was not what Goodwin understood the statements to mean, but what the speakers actually meant and intended. Assuming for the argument that the admission of this testimony was error, the meaning of what Fayer and Bernstein said is so clear from the overall context of the recorded conversation that the error was harmless.

The judgment of conviction is affirmed.

FOOTNOTES

[1] The Government appealed the acquittal on the obstruction of justice charge, contending that Judge Weinstein had misconstrued the law, but this Court held that the judgment of acquittal was not appealable under 18 U.S.C. § 3731. *Fayer*, 523 F.2d at 664.

[2] Appellants' counsel said: "With respect to count four, I don't base the motion on collateral estoppel but I base it on the fact that the jury was permitted to consider a charge which was not in the indictment." Counsel's failure to include collateral estoppel in this motion was not ill-considered. Judge Weinstein made no findings on the first trial with reference to the matters charged in the fourth count.

[3] The following excerpts from the recorded conversation are illustrative:

Rose Bernstein: (Inaudible) But, uh, we have testimony that you took money from the Bernsteins.

Fayer: Yes. No.

Rose Bernstein: U, I and I, and everything. Don't you think at that point that Ed should have said, uh, testimony that's not true. Shouldn't he have said that?

Fayer: Right. Should have said it's a lie, but, however, what's the difference.

• • •

Fayer: Let's assume, for argument's sake, they get hold of "X".

Goodwin: Yeah.

Fayer: Some other appraiser.

Goodwin: Yeah.

Fayer: After they get him he admits it.

Goodwin: Uh huh.

Fayer: Now he admits it so they tie him in. But that doesn't affect you. The only one that can affect you is you.

• • •

Rose Bernstein: Al, isn't it true, in order, in order to, in order to prove certain things strictly, wouldn't there be a third party to see.

Fayer: No. You see the thing is this. Not necessarily a third party. We could happen to have a check.

Rose Bernstein: You'd have to have a check.

Fayer: You'd have to have, uh, the bank deposits. You would have to have, uh . . .

Rose Bernstein: Yeah, the books, to explain.

Goodwin: Corroboration.

Fayer: Yes, corroboration.

Goodwin: Some kind of corroboration.

Fayer: This is why what, when you, you said to me, at the outset what really started it, that you were told, that they made an accusation is sufficient. Not in the United States of America. Not here.

• • •

Fayer: For Christ sake I says look, I says, this is something that has to be proven and has to be established. It is not that simple, Ed. Sounds great, but they're gonna need all sorts of (inaudible) at this time. So don't be so goddamned nervous.

[4] Because the district court suspended sentence on counts I, II and III with a one-month period of probation and there was no prejudicial spillover between counts, this is a case in which the concurrent sentence rule could properly have been applied to count III. *United States* v. *Mejias*, 552 F.2d 435, 444-45 (2d Cir. 1977).

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of March, one thousand nine hundred and seventy-eight.

Present: HON. JAMES L. OAKES

HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

HON. JOHN R. BARTELS
District Judge

77-1389

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFRED FAYER,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-eight.

Present: HONORABLE JAMES L. OAKES

HONORABLE ELLSWORTH VAN GRAAFEILAND
United States Circuit Judges

HONORABLE JOHN R. BARTELS
United States District Judge

77-1389

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFRED FAYER,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant Alfred Fayer

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

Trial Court's Findings of Fact and Conclusions of Law.

(A559)

• • • • • •

The Court: I think I first ought to indicate what is not in this case. We're not trying the professional capacity of the defendant or his metier. Nor are we trying a disciplinary action. Although there are ample grounds in the transcript and testimony for disciplinary action in the state courts. I assume the United States Attorney will, whatever the outcome of this case, will take appropriate action to transmit those transcripts to the authorities interested in disciplining lawyers.

We're not concerned because no motion to suppress has been made with respect to the legality of the tapes and their use, although I suppose an argument could be made that the tape of February 9th constituted a violation of somebody's Constitutional right to advice from counsel. Whether this defendant raised that point seems doubtful under the circumstances. But the issue has not been raised, so I don't decide it.

There is no attorney-client privilege problem here, although it was considered a conference among clients and attorneys.

Under the definition of Rule 503 of the Rules (A560) as promulgated by the Supreme Court, but not adopted by Congress, Rule 503-A(1) includes within the relationship consultation with a lawyer, "with a view to obtain professional legal services from him."

And under D(5), communications included are those "relevant to a matter of common interest between two or more clients."

Where the clients are consulting in common with an attorney.

Although Goodwin states he wasn't aware of the fact Fayer would be present, I credit that testimony once Fayer

was on the scene, Goodwin never told him that he didn't want legal advice or he wasn't concerned about legal advice. So that Fayer under the circumstances possibly might have a doubt about whether he was giving legal advice to Goodwin and Goodwin's implied request, particularly, since apparently this had been the suggestion of Rose Bernstein when Rose Bernstein had contacted Fayer. Because there would be no right to prevent conversations from being revealed since the privilege belongs to the Bernsteins, if any, and to the witness, Goodwin, weighed whatever privilege he had.

But with respect to the problem of Fayer relationship, it is arguable he could have believed that (A561) he was consulted in order to obtain professional legal advice, with the possibility of being retained. The Court recognizes it is the practice of clients from to time, even though they are represented by one attorney, to seek advice from another attorney. Whether that was unethical in the circumstances isn't before us. We're not also concerned here with the problem of punishing the defendant for the advice that he gave, although it may have inhibited the Government in its proper quest for information.

As the Supreme Court has recently pointed out in its opinion of January 15, 1975, in Mannes v. Meyers, 43 Law Week 4143 at page 1443, "The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present . . . could be penalized for advising his clients in good faith to assert it. The assertion of the testimonial privilege as many other rights often depends upon legal advice from someone who is trained and skilled in the subject matter and who may offer a more objective opinion . . . If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice, it is hardly debatable that some advocates may lose their zeal

for the rightness and (A562) independence. If his lawyer may be punished for advice so given there is a genuine risk the witness exposed to possible self-incrimination or while not being advised of his rights, then the witness may be deprived of the opportunity to decide whether or not to assert the privilege."

Again, on page 4151 Mr. Justice Stuart concurring says: "To punish him for performing his professional duty in good faith will be an arbitrary interference with his client's rights to presence and on retaining counsel, thus a denial of due process of law."

I'm directing myself to the particular questions that are before us. We have first 72 CR 589; in essence that accuses the defendant of aid and abetting Bernstein, Harry and Rose, in providing something of value to Goodwin to prevent him from testifying. Beyond a reasonable doubt the Court would have to find on the basis only of the testimony before us and, of course, without hearing the story of the Bernsteins as subject to that story and testimony in evidence they were offering a job in payment of services in order to induce Goodwin not to testify. But the Court must find a reasonable doubt based upon the testimony of the defendant himself that he truly (A563) believed the Bernsteins' innocence and that he did not understand the nature of the transaction as one to pay Goodwin for not testifying.

In addition, there is a reasonable doubt in the Court's mind as to whether the agreement had not already been made on the 8th with respect to that matter.

The defendant's testimony strikes the Court as being naive to the point of foolishness. It is difficult to believe that anyone could remain in practice for so many years and not understand what the Bernsteins were doing and not believe that the Bernsteins were using him to aid and abet them in their scheme.

Based upon the defendant's demeanor the Court does not have a reasonable doubt as to that point. It does have a reasonable doubt as to the state of mind and intention of the defendant Goodwin, although Goodwin did aid and abet the Bernsteins. His intent with respect to corruption as charged in 72 CR 589, he did not beyond a reasonable doubt do it willfully and intentionally.

Mr. Korshin: When your Honor said Goodwin, I think you meant Fayer.

The Court: Fayer, I meant. Accordingly, (A564) 72 CR 589 is dismissed. The finding is made in connection with that indictment and, of course, does not indicate any view of the Court with respect to the Bernsteins or Eastern Service Corporation, since they have not had their day in court and it is based solely hypothetically on the facts as reviewed in the prosecution of this defendant; solely for the purposes of this prosecution.

Now, as to 75 CR 43, I find that a very difficult case. And I'm going to reflect on it over the lunch hour and will take a recess until 2:10.

(Luncheon recess taken at 1:10 P.M.)

(A565) AFTERNOON SESSION

(2:10 P.M.)

The Court: Continuing our discussion of 75 CR 43, I find beyond a reasonable doubt that the defendant intended and that everybody present including Goodwin, Rose Bernstein, Harry Bernstein and himself understood he was advising Mr. Goodwin not to testify voluntarily before the Grand Jury, and that this was the great danger that all of them were concerned about.

The references to a subpoena are fully consistent with that finding. What the defendant was telling Goodwin was that Goodwin should not go voluntarily, should not give any

information and that if he was subpoenaed, then he would require the advice of counsel who would be supplied at the appropriate time.

This finding of fact beyond a reasonable doubt, however, does not solve the problem in the case raised by a need to show that the advice was given corruptly. 1503, Section 1503 of Title 18 provides:

"Whoever corruptly endeavors to influence any witness, that includes a witness who is a prospective witness about to be called or appear voluntarily."

(A566) The question of what corruptly means is not at all clear from the cases. I started by saying at the beginning of the case, I had read the two cases cited by the attorneys for the Government and curiously in footnote 19 of Mannes vs. Meyers, the Supreme Court majority opinion says, "we recognize that there may be instances where advice to plead the Fifth Amendment could be given in bad faith or could be patently frivolous or for purposes of delay and such instances would present far more difficult issues than here."

And the two cases cited are Cole, 329 F. 2d 437 and Cioffi, 493 F. 2d, 11 at page 1119. I suppose another instance would be suggesting that the Fifth Amendment be pleaded or that a witness not testify when the witness wants to voluntarily appear.

In order not to protect the witness but to protect some other person or entity. But that isn't completely clear here. For one thing, the defendant may have intended primarily to protect Eastern Service Corporation and Harry Bernstein and Rose Bernstein and yet may have also wanted to give Goodwin advice that would assist Goodwin.

Also, it is not clear at the moment, at least, whether the defendant was advising Goodwin as an (A567) attorney or in some attorney-client relationship. The definition of corrupt is not clear from the cases. In Cioffi at 1119 the Court says, Judge Martley defined endeavor as "any effort or any

act, however contrived, to obstruct, impede or interfere with a witness," and she told the jurors that any such endeavor is corrupt.

Obviously, that can't be a complete definition or every lawyer telling his client not to volunteer before a Grand Jury or to plead the Fifth Amendment would be guilty of corruption. Then, the Court proves the Cole decision as charged by Judge Martley, "I charge you that while a witness violates no law by claiming the Fifth Amendment privilege against self-incrimination in a Grand Jury, one who bribes, threatens, coerces a witness to claim it or advise with corrupt motive a witness to take it, can and does obstruct or influence the administration of justice."

But that is completely circular because it doesn't tell you what a corrupt motive is. Neither with all due respect does the Second Circuit opinion where Judge Martley—or does Judge Martley's suggestion?—same thing is true in the Cole case. It's true of all the other cases that I have been able to find, including U.S. vs. Polacove, 192 F. 2d, 333; (A568) U.S. vs. Cohn, 202 F. 2d Sub. Div. 567; Knight, 310 F. 2d, 305; Broadbent vs. U.S., 149 F. 2d, 580.

True of the proposed charge in Devitt, in Blackmore, the Federal Jury Practice & Instructions, 1970, Section 27.08, "If done voluntarily and intentionally, with a bad purpose of accomplishment either with an unlawful end or result or a lawful end or result by some unlawful means or method." Whether this is a lawful means or a lawful end is the exact issue before us.

Again, the charge is, "The motive to act corruptly" is ordinarily a hope or expectation of benefit to one's self or some aid or benefit to another. Obviously, that definition is useless because every attorney would be guilty since he is trying to benefit his client or somebody else. Black's Law Dictionary is useless for corrupt; it means "spoiled, tainted, visited, deprived or debased."

Corrupt intent involves the purpose to violate the law. That doesn't tell you what a violation of the law is, so it's circular.

Webster's Third New International Dictionary, "Corrupt is deprived, evil, weakened, debased," showing the morality characterized by bribery or (A569) selling of political favors or other improper or political or legal actions or arrangements. It does not tell me what is improper.

I haven't received a brief from defendant and I haven't received a satisfactory brief from the Government, although they have done what they could. I don't believe I ought to decide the case until I have the matter brief.

Mr. Gould: Your Honor, in our brief we had the same problem. We did look up the law but looking at the facts pattern, particularly in that Cole case as to what it was they thought added up to corrupt there, and in fact the pattern particularly was identical to—

Mr. Woodfield: Same with the Cioffi case, your Honor.

The Court: Not so sure it was.

Mr. Gould: The facts are—

The Court: Those were all people involved in the underlying conspiracy, not in the training.

Mr. Woodfield: Your Honor, again I'm—I'm sorry, your Honor; I could have—

The Court: Cioffi, yes.

Mr. Woodfield: Again, your Honor, on Cioffi, at 1119, the fact pattern is very similar in the sense (A570) that that case, the defendant Cioffi was aware of the relationship between Shearer and Mirando. And aware of that relationship, his endeavor to influence the testimony is corrupt and that's our argument here. The fact that Mr. Fayer was aware of the relationship between the Bernsteins and Goodwin and his efforts thereafter to induce Goodwin's testimony is corrupt.

The Court: It's so broad to cover every attorney.

Mr. Woodfield: Excuse me. So broad that every attempt?

The Court: Every attorney giving advice.

Mr. Woodfield: No, your Honor. Not when he is representing the individual. Not when he's a client. Not when there is good faith such as Mannes vs. Meyers case. There specifically they rule out six times in that opinion, they say good faith.

The Court: What is "good faith" here? That's part of the problem. Obviously the defendant was interested in saving the Bernsteins and the corporation, that's clear. He has admitted it on the witness stand and the transcripts are pregnant with that. It is not clear he wasn't also trying to help the defendant. The prospective witness Goodwin. Not clear to me what the relationship was, that is, whether (A571) he was in a client-attorney relationship. It's a very difficult problem of ethics and law. I really don't have the full brief on it. I find it very troublesome.

Mr. Gould: Your Honor, as to the client-attorney relationship, it was clear from this transcript that Mr. Goodwin had an attorney and had a retained attorney. Now, whether in the future he would—

The Court: I know, but you know it doesn't, I'm not sure but you may be right. I'm not sure that under the Code of Professional Responsibility it is improper for one attorney to see a client even though he knows that client is represented by another attorney.

Is that like an attorney seeing a party, an adversary party represented by his client's attorney, which is clearly unethical? That wasn't that and it's a very curious problem. I really think that you're going to have to brief the case more fully. I think you have to go into the professional responsibility code back there to some extent so we can get some feel for what's right and wrong here, what is

corrupt. And you may have to go into some of the background of what is the attorney-client relationship.

When does it start and what is the problem when (A572) you have a conflict of representing people. All of those I averted to at the beginning of my discussion before I actually turned to 72 CR 589, the first indictment. I'm not making the finding with respect to any of this. The only finding I've made on 75 CR 483, is that he was advising, do not go voluntarily before this Grand Jury.

He was not merely advising him, don't go to the FBI, he was saying, do not testify before the Grand Jury. If you get a subpoena, then we'll get you an attorney.

What is corrupt under those circumstances isn't clear to me and I'd like more guidance.

Mr. Gould: Your Honor, under the—there is one point in which Mr. Fayer, I believe on cross-examination where they're talking about the part of whether Mr. Goodwin's attorney should investigate further, not talking about the government agency, your own lawyer isn't going to bring. When Mr. Fayer stated, please stay out, Goodwin stayed out. Those people were talking, Harry Bernstein, don't tell him to start investigating.

If your Honor would like for us to you the tape again because I think on the tape it's very clear that statement was not in effect made to Harry (A573) Bernstein. Certainly Goodwin didn't state to Bernstein in the third—Mr. Fayer, I think that was very heavily the point because we're talking perhaps Mr. Fayer is telling the man's own attorney not to investigate. That certainly couldn't be to protect Mr. Goodwin. I'd like to make that tape available, if you think it's necessary.

The Court: No, I don't think it's necessary because I think we're going to have to brief this. I dislike burdening counsel but I am genuinely puzzled and I never have heard of a case that raises this kind of point.

Mr. Gould: I looked at the ARA Code cover to cover on this, your Honor, and it does talk about opposing parties. Does the spirit of that, the way I read it as Mr. Fayer conceded on cross-examination, there came a time—I think it is incredible—he didn't know it—even assume what he says is accurate it wasn't until somewhere in the middle of this conversation that he was aware, at least, that Mr. Goodwin might have been levelling charges. And the Bernsteins: "we'll deny it." That at least—

The Court: But even assuming that's true.

Mr. Gould: Isn't this at variance to Mr. Bernstein's, no question about it?

(A574) The Court: But is mere conflict that your client might possibly have enough to make advice in good faith to one of them? Whatever good faith means, they're corrupt.

Mr. Gould: Mr. Fayer said himself he got other people different attorneys because there would be a conflict otherwise. And now here he is—

The Court: He was suggesting just giving them temporary advice in a sense, in connection with a consultation on whether he should get another attorney. See, part of the problem is that Mr. Goodwin never said to him, I don't want advice from you. I've got my own attorney, in essence, and led him on.

I don't think that's all decisive and it's a very difficult problem, as I say, involving an issue of ethics. In view of the attorney-client relationship as reflected in the privilege, because that's where most of these cases turned up and in criminal law—

Mr. Gould: Will it reflect on ethics whether it has been a violation of the Code or does it reflect on the intent of the act toward an attorney who has been running things the way Mr. Fayer says he has been running Eastern Services, talking to Judge Rifkind who confides

in him and tells him what the (A575) client is doing. Somebody goes down to Florida, Atlanta, and he can run this huge business. Would an attorney like that be so naive, choose your own terms, your Honor has to sit there and say, well, this man has an attorney and I'm—I have the Bernsteins. He's going to level charges against the Bernsteins and the Bernsteins are offering him a job in Florida, offering to pay attorney fees. I'm going to advise him and feel that there is nothing wrong with it.

This is not as he himself stated, several times in the transcript. You know, my reputation, I'm sure he had a very good reputation. He had run a very big company.

The Court: Problem I'm concerned with is we're not dealing with a question of whether there is a violation of ethics. That's another question. I don't know whether there is or not. It may have a bearing on whether this is corrupt and we're dealing with a criminal statute. And I haven't found anything very helpful.

Mr. Korshin: Which may be unconstitutionally vague.

The Court: That's possible, too. But I haven't got any brief from. I don't say that critically, I think you handled the case very well and so have the (A576) Government's attorneys. But I would like some help unless you don't feel it warrants a brief.

Mr. Korshin: I would be very happy to give your Honor a brief but I would like to get the transcript first.

Mr. Gould: Your Honor, do you wish us to give—

The Court: Well, I'm not quite sure. I don't think there is any point in making any further findings. I just made that one finding because I think it's critical. If I made that finding adverse to the Government, that would have been the end of it. Because the Government charges, the Grand Jury not Federal Bureau of Investigation—well, how much time to you want? How much time do you want, and I'm not going to rush you. I'd like a thorough job on it because I'm troubled by it.

Mr. Korshin: Could I have until the end of—

The Court: April 1st, fine.

Mr. Woodfield: Again, just to enlighten by discussion. This hopefully narrows it down in our investigation into this work. I take it as the key, as the definition of corrupt—

The Court: It seems to me, although I'm not sure, maybe affected to some extent by what the relationship was between this defendant and Goodwin.

(A577) Mr. Woodfield: My interpretation of the word "corrupt" or not interpretation, not defining it but in a sense this statute would be a factual determination; that is, what is in the mind of the inducer such as Mr. Fayer.

The Court: Can you articulate a standing?

Mr. Woodfield: I can't articulate but I can say based on the facts of those cases and this case, I don't want to argue now, to end up briefing to you a factual argument. We satisfy the facts of these cases and—

The Court: Better do the best you can.

Mr. Woodfield: Because I believe that a search of the definition of the word "corrupt" would bring results probably similar to yours.

The Court: Well, maybe.

Mr. Woodfield: Factually, we satisfy both Cioffi and Cole.

The Court: I prefer to be able to articulate substantive standards before I apply facts to them. And perhaps you can be of some help. Maybe we can move it forward or back.

Mr. Gould: Even our machine didn't help us.

The Court: It's a difficult question. We want to get a definition that doesn't make a criminal (A578) of every lawyer.

Mr. Woodfield: It might be helpful here to get the full charge that was given in Cioffi.

The Court: Possible you might, although I might suspect you can find what we just found.

Mr. Korshin: Your Honor, anticipating what was on your Honor's mind, I didn't make notes of the cases as you gave them. I'd rather not have to wait for the transcript.

The Court: You can have this whole thing.

Mr. Korshin: Just make a list and I'll do it.

The Court: If you will, this is what's on my—

Mr. Woodfield: We have a hung judge.

The Court: Not yet, no. Not a hung judge, you have a judge who wants to have time to reflect.

Mr. Korshin: I assume the defendant's status remains as it was?

The Court: Yes.

(Hearing adjourned at 2:25 P.M.)

(A579) The Court: Although at the last session of this trial I asked for briefs, I have given the case a great deal of consideration in the interim and I had my law clerk call the parties to inform them that briefs will not be necessary because I have decided that under no view of the law and the facts can I determine beyond a reasonable doubt that the defendant is guilty. There is a reasonable doubt necessarily because I must and do credit the defendant's testitimony with respect to what the Bernsteins said to him. It is fully consistent with what I heard on the tapes and it's consistent with the way the Bernsteins apparently generally manipulated people.

As far as Goodwin is concerned, the transcript clearly reveals in a sense he led Mr. Fayer on to believe what the Bernsteins had apparently told him and that is that Goodwin wanted legal views from Fayer with respect to whether he should continue to rely upon this attorney or whether he should get a new attorney.

I'm also in part basing the decision on the fact that the attorney that he did procure was a respected member of the bar, his present attorney, who I do not believe was

subject to manipulation (A580) by the Bernsteins or by Mr. Fayer.

Given the burden of proof in a criminal case, therefore, the defendant must be found not guilty of both counts.

The United States Attorney is directed to provide a transcript of the record of this case and of the recordings and typed transcript of those recordings to the appropriate disciplinary committee in the Second Department.

I make no findings on whether he violated any legal obligations or moral obligations. That's not my duty.

Mr. De Petris: The Government would request under Rule 23(c) special findings of fact.

The Court: I have made those findings. What other areas do you want me to find?

Mr. De Petris: A number of areas. Should I address your Honor's—

The Court: Give me the questions; I'll give you the answers.

Mr. De Petris: First, whether or not there was a grand jury proceeding pending in this court at the time.

The Court: There was.

Mr. De Petris: Is that beyond a reasonable (A581) doubt?

The Court: Beyond a reasonable doubt.

Mr. De Petris: Second, the defendant was aware of the grand jury proceeding.

The Court: I so find beyond a reasonable doubt.

Mr. De Petris: Third, Goodwin was a witness in the proceeding within the meaning of the law; that is the new material fact, and was expected to testify.

The Court: I so find beyond a reasonable doubt as I indicated at our last session.

Mr. De Petris: Fourth, the defendant knew or reasonably expected Goodwin to be a witness.

The Court: I so find beyond a reasonable doubt.

Mr. De Petris: And fifth, that the defendant did endeavor to influence Goodwin to take the Fifth Amendment before the grand jury.

The Court: I do not find that beyond a reasonable doubt.

Mr. De Petris: Not at that point, your Honor, to the question of corruptly, since as your Honor found the last time they did make that effort to influence him—

(A582) The Court: No, he didn't. That's part of the problem. What he did say was, "Don't go voluntarily," in my opinion. If he went voluntarily, it wouldn't be a Fifth Amendment situation at all. If you're subpoenaed, to get another counsel, that would have been the Fifth Amendment situation, and he in effect was saying over and over again, "Before you decide on the Fifth Amendment, consult other counsel." I can't make that finding beyond a reasonable doubt.

Mr. De Petris : Your Honor does not find that Mr. Fayer made an effort to influence Mr. Goodwin to take the Fifth Amendment?

The Court: No, what he did was attempt to as I find beyond a reasonable doubt, influence him not to go voluntarily before the grand jury. I think that's the equivalent.

Mr. De Petris: Finally, your Honor, would you make a finding concerning his motive, that is, do you find beyond a reasonable doubt that his motive or a substantial or primary motive—withdrawn. Let me start again.

Do you find beyond a reasonable doubt that the primary motive of Mr. Fayer was to protect the Bernsteins?

(A583) The Court: I find that that was one of the motives, clearly, but I cannot find beyond a reasonable doubt that that was the only motive, because it seems to me that on the basis of the record it's quite possible to find that he was in good faith or very foolishly trying to advise Goodwin with respect to Goodwin's rights in the hope of assisting Goodwin as a friend of the Bernsteins. That's the problem with the case.

Mr. De Petris: Does your Honor make a finding with respect to motive with regard to Mr. Fayer's financial interest with respect to Eastern Service Corporation?

The Court: No, I don't think there's anything to that. There's no proof of that sufficient to make any finding.

Mr. De Petris: Does your Honor finally, with regard to this count, is your Honor's decision based on your interpretation of the legal meaning of "corruptly"?

The Court: No, because I think under any definition of "corruptly" this result would be required. I think, myself, it would be corrupt for him to have advised had he not had as one of the subsidiary motives the giving of legal advice (A584) in good faith to Goodwin; that is, if the whole thing were set up to protect the Bernsteins rather than Goodwin, I would have found him guilty, but I do not think that, considering the whole matter, there is a very substantial doubt about whether he was not also concerned with Goodwin in good faith as a lawyer, although a lawyer acting so foolishly as to almost defy belief. But being foolish is not a crime.

Mr. De Petris: Might I have a moment, your Honor.

The Court: Yes.

Mr. De Petris: Does your Honor make any finding with respect to which of the two motives that your Honor has referred to protecting the Bernsteins and advising Goodwin as a lawyer, as a friend of the Bernsteins, as to which was bribery?

The Court: No, I can't. They were both involved, intertwined. I couldn't make that determination, certainly not beyond a reasonable doubt.

Mr. De Petris: Finally, your Honor, the Government would ask, and I use the word "finally" quite a bit. I'm sorry about that. The Government would ask that your Honor make a finding, reach (A585) a verdict and special findings of fact with respect to the lesser included offense under Section 201(h) of Title 18.

I was not here last Thursday when your Honor made a ruling on the bribery count, and so I have ordered the transcript, but it has not been reached yet, but I have a general idea what your findings were with respect to that count. I would ask your Honor to make that specific finding.

Mr. Korshin: Might I have a look at the section? By number I don't remember it.

The Court: I make a finding under 201(h) the Government did not prove its case beyond a reasonable doubt for the reasons I stated at the last session.

Mr. De Petris: I would ask for special findings with respect to that count, too.

Does your Honor find beyond a reasonable doubt there was a grand jury proceeding in this court?

The Court: I do.

Mr. De Petris: Does your Honor find beyond a reasonable doubt the defendant was aware of that proceeding?

The Court: I do.

(A586) Mr. De Petris: Does your Honor find beyond a reasonable doubt that Mr. Goodwin was a witness in that proceeding?

The Court: I do.

Mr. De Petris: Does your Honor find beyond a reasonable doubt that the defendant knew or reasonably expected Goodwin to be a witness?

The Court: I do.

Mr. De Petris: As I understand it, your Honor found—made a finding of fact last time beyond a reasonble doubt that Mr. Fayer did aid and abet the Bernsteins' offer of something of value; that is—

The Court: No, I did not so find. I said he was aware of it, but he did not aid or abet and in my opinion the decision had been made before he even came into the picture.

Mr. De Petris: Does your Honor find beyond a reasonable doubt that on the date in question on the tape that

Mr. Fayer participated in an offer of something of value on that date?

The Court: I do not.

Mr. De Petris: Does your Honor find beyond a reasonable doubt that the Bernsteins made an offer of something of value on that date?

(A587) The Court: They have made it on that date and they made it before. They made it the day before and confirmed it on that date.

Mr. De Petris: Does your Honor find beyond a reasonable doubt that Mr. Fayer participated in that discussion?

The Court: He was present, but he did not participate in that offer or in renewal of the offer.

Mr. De Petris: As I understand your findings of last week, you found there was a reasonable doubt on the question of willfulness and specific intent.

The Court: That's correct.

Mr. De Petris: So the Government was pointing out today under the gratuity count, willfulness, specific intent is not an element of crime, and therefore we would submit that Mr. Farley is guilty beyond a reasonable doubt.

The Court: He isn't. The Bernsteins, as it turned out from the tape, were vicious manipulative people. You can't find a lawyer guilty of crimes because he is in good faith advising a client who's going ahead and continuing to commit other independent crimes. I just don't find beyond a reasonable doubt that this defendant was engaged in a conspiracy (A588) with the Bernsteins. I don't think that was his role here, beyond a reasonable doubt. With the preponderance standard or clear and convincingly standard, which may apply in a disciplinary hearing, and I certainly said I make no such findings. I'm dealing with beyond a reasonable doubt standards in a criminal case.

Mr. De Petris: Does your Honor find the offer made on the date of the tape—find beyond a reasonable doubt that

the offer that was made on the date of the tape with respect to the attorney's fees and private employment was made for or because of the testimony to be given by Goodwin before the grand jury?

The Court: Which tape? There were two tapes. The offer was made—

Mr. De Petris: The restaurant tape.

The Court: An offer was made by the Bernsteins the day before and it was renewed again in a sense by reminding Goodwin of it. This defendant, I don't find, participated in it beyond a reasonable doubt.

Mr. De Petris: Your Honor, as I recall the offer of a job with the Bernsteins was on the 9th, the date Mr. Fayer—

(A589) The Court: It's clear from the tape it had been a continuing offer they made before, but that was an understanding they had, at least I don't find beyond a reasonable doubt to the contrary.

Mr. De Petris: Is your Honor's decision based upon the fact this was a continuing crime and therefore as a matter of law Mr. Fayer could not participate in it—

The Court: No, that is not so. He could have been an aider and abettor even if it was continuing.

Mr. De Petris: Your Honor, that is all the special findings.

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Supreme Court, U. S.
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No. 77-1746

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED FAYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 573 F.2d 741.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on March 27, 1978. A petition for rehearing was denied on May 10, 1978 (Pet. App. 13a). The petition for a writ of certiorari was filed

on June 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government was barred by the doctrine of collateral estoppel from prosecuting petitioner for testifying falsely at a criminal trial at which he was acquitted.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on four counts of knowingly making false material declarations before a court of the United States, in violation of 18 U.S.C. 1623. Petitioner was fined $5,000 on the fourth count. Imposition of sentence on the other counts was suspended, and petitioner was placed on probation for one month. The court of appeals affirmed (Pet. App. 1a-11a).

In 1974 Harry and Rose Bernstein and their wholly owned company, Eastern Service Corporation, were convicted of securing false Federal Housing Administration (F.H.A.) appraisals for mortgages that they owned and serviced by bribing F.H.A. appraisers, one of whom was Edward Goodwin. See *United States* v. *Bernstein*, 533 F.2d 775 (C.A. 2), certiorari denied, 429 U.S. 998. On February 9, 1972, prior to the indictment in that case, petitioner, who was the Bernsteins' attorney, met with his clients and Goodwin and attempted to convince Goodwin

that he should not give any information to the grand jury that was then investigating the Bernsteins' activities. Unbeknownst to petitioner or the Bernsteins, however, Goodwin had already agreed to cooperate with the government investigation, and the entire conversation was tape recorded by a device concealed on Goodwin's person (Pet. App. 2a-3a).

The transcript of the recorded conversation established that both the Bernsteins and petitioner repeatedly urged Goodwin not to testify before the grand jury. They also urged Goodwin to discharge his attorney, who had recommended that Goodwin cooperate with the government, and replace him with another attorney who would be paid by the Bernsteins. Finally, the Bernsteins, with petitioner's apparent approval, offered Goodwin a job in their Florida office if his refusal to cooperate cost him his F.H.A. job (Pet. App. 3a).

Based on his conduct at this meeting, petitioner was indicted in the United States District Court for the Eastern District of New York for obstructing justice by wrongfully endeavoring to influence a witness, in violation of 18 U.S.C. 1503, and for aiding and abetting in the attempted bribery of the witness, in violation of 18 U.S.C. 201(d). After a non-jury trial, petitioner was acquitted on all counts. Petitioner's conviction on four counts of perjury arose out of his testimony at this trial.

The judge who presided at petitioner's obstruction and bribery trial entered specific findings of fact pursuant to Rule 23(c), Fed. R. Crim. P. In finding

petitioner not guilty of attempted bribery, the judge concluded that petitioner "did aid and abet the Bernsteins" (Pet. App. 17a) and that it was difficult to believe that petitioner did not know that his clients "were using him to aid and abet them in their scheme" (*id.* at 16a). The judge ruled, however, that he had a reasonable doubt whether petitioner had acted willfully and with the intent to corrupt and also whether the bribery attempt had in fact been completed at an earlier meeting that petitioner did not attend (*id.* at 16a-17a). With regard to the obstruction of justice count, the judge found that petitioner had advised Goodwin not to testify voluntarily before the grand jury and that he was at least partially motivated in that request by his desire to protect the Bernsteins, but that there was a substantial doubt whether he was not also attempting to advise Goodwin in order to protect Goodwin's rights (*id.* at 17a, 28a-29a). Since the judge could not find beyond a reasonable doubt that petitioner's *sole* motive was to avoid his clients' prosecution, he concluded that the government had failed to establish the corrupt intent required by the statute (*id.* at 26a-28a).[1]

ARGUMENT

Petitioner contends that his conviction must be reversed because the findings of the trial judge who

[1] The government sought to appeal the ruling on the obstruction of justice charge, contending that the trial judge had misconstrued the law, but the court of appeals held that the judgment of acquittal was not appealable. See *United States* v. *Fayer*, 523 F. 2d 661 (C.A. 2).

acquitted him of attempted bribery and obstruction of justice at the earlier trial collaterally estopped the government from prosecuting him for making false statements at that trial. The court of appeals correctly rejected this claim.

It is well established that the acquittal of a defendant following a trial on criminal charges does not automatically raise a collateral estoppel bar to his subsequent prosecution for perjury committed during the course of that trial. *United States* v. *Williams*, 341 U.S. 58, 63-65; *United States* v. *Gugliaro*, 501 F. 2d 68 (C.A. 2); *Adams* v. *United States*, 287 F. 2d 701 (C.A. 5). True, as petitioner notes, the doctrine of collateral estoppel has a role to play in such circumstances, but collateral estoppel "means simply that when an issue of ultimate fact has been determined by a valid and final judgment, *that issue* cannot be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (emphasis added). Hence, the doctrine does not prevent a perjury charge unless the "verdict in the [earlier] trial was a determination favorable to petitioner of the facts essential to conviction of the [false statements] offense." *Sealfon* v. *United States*, 332 U.S. 575, 578-579. Here, as the court below correctly decided (Pet. App. 6a-8a, 10a n.2), the specific findings of the trial judge at petitioner's obstruction of justice and bribery trial clearly show that the issues raised by the four false statement counts had not been previously resolved against the government.

The first count charged petitioner with perjury

for testifying falsely that his advice to Goodwin not to cooperate was limited only to the F.B.I., whereas he had actually advised Goodwin not to testify before the grand jury. Contrary to petitioner's claim that "the first trier of fact had specifically found such denials credible and had acquitted petitioner on that identical issue" (Pet. 6), the judge at the first trial found the facts determinative of this issue in favor of the government, stating that "what [petitioner] did was attempt to as I find beyond a reasonable doubt, influence [Goodwin] not to go voluntarily before the grand jury" (Pet. App. 28a; see also *id.* at 17a-18a, 22a, 24a). Petitioner was acquitted not because the court agreed that his advice related to the F.B.I. rather than the grand jury (see *United States* v. *Ryan*, 455 F. 2d 728, 733 (C.A. 9)), but because there was substantial doubt whether the advice not to testify before the grand jury had been given with a corrupt motive (see Pet. App. 7a). See *United States* v. *Williams*, *supra*, 341 U.S. at 64 n.3.

The second count alleged that petitioner testified falsely when he denied that the parties to the recorded conversation were discussing "accusations and allegations" that the Bernsteins had paid bribes to Goodwin. The court of appeals' opinion fully disposes of petitioner's claim that the prosecution on this count was barred because the judge at the first trial found that the government had not established beyond a reasonable doubt that petitioner did not truly believe in the Bernsteins' innocence (Pet. App. 7a-8a; footnote omitted):

> It is clear from the transcript that the parties were discussing "accusations and allegations" that Goodwin took money from the Bernsteins. That [petitioner] might have believed the Bernsteins innocent of these charges did not indicate in the slightest that the accusations had not been made. Indeed, if [the trial judge] was not convinced that the Bernsteins had been accused of bribery, his finding that Fayer believed them to be innocent was meaningless. Innocent of what? The Bernsteins were not being accused of murder or assault; they were being accused of bribery. [The trial judge's] finding that Fayer believed them to be innocent does not gainsay that the accusation was made and discussed; to the contrary, it confirms it. There was no estoppel barring [petitioner's] conviction on count II.

Count III involved Harry Bernstein's statement to Goodwin during the course of the recorded conversation that "If you say anything, it blows everything" (Pet. App. 8a). When questioned about this statement at the prior trial, petitioner had testified that he believed Bernstein was referring only to harm that might befall Goodwin. The indictment charged that this answer was false because petitioner in fact knew that Harry Bernstein had been referring to the possibility that Goodwin could "blow everything" for Bernstein himself, his wife, and his corporation. Once again, the court's findings at the prior trial did not resolve this issue against the government. Indeed, the trial judge found beyond a reasonable doubt that one of petitioner's motives in attempting to persuade Goodwin not to testify had been to "protect

the Bernsteins" (Pet. App. 28a). Although the judge also concluded that petitioner may have believed the Bernsteins to be innocent, that finding was not inconsistent with the government's theory at the perjury trial that, in making the statement, Harry Bernstein had been concerned with the problems Goodwin's testimony might cause the Bernsteins and Eastern Service Corporation and that petitioner was well aware of that concern.[2]

The fourth and last count charged petitioner with testifying falsely that his statement, "[p]lease stay out of it, please," in the recorded conversation had been directed to Rose Bernstein, in an effort to keep her from interrupting the conversation, rather than to Goodwin, in an effort to keep Goodwin's attorney out of the investigation. We note at the outset that petitioner expressly declined to rely on collateral estoppel at the perjury trial as a basis for the dismissal of this count and that he therefore waived his right thereafter to assert the claim (Pet App. 3a-4a n. 2). See *United States* v. *Perez*, 565 F. 2d 1227, 1232 (C.A. 2); *United States* v. *Scott*, 464 F. 2d 832, 833 (C.A. D.C.); *United States* v. *Buonomo*, 441 F. 2d 922, 925 (C.A. 7), certiorari denied, 404 U.S. 845; *Grogan* v. *United States*, 394 F. 2d 287, 289 (C.A.

[2] We note, moreover, that petitioner received an identical, concurrent sentence on the first three perjury counts, so that if any one of these counts was not barred by collateral estoppel it would be unnecessary for the Court to consider the issue with regard to the other two counts. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16.

5), certiorari denied, 393 U.S. 830; *Haddad* v. *United States*, 349 F. 2d 511, 513-514 (C.A. 9), certiorari denied, 382 U.S. 896.[3]

In any event, prosecution on Count IV was not barred by collateral estoppel because, as the court below noted (Pet. App. 10a n.2), the judge at the first trial made no findings with respect to the essential matters contained in this count. Although the government did argue during the obstruction trial that petitioner's remark had been addressed to Goodwin, the judge declined to decide the issue (Pet. App. 22a) and instead entered an acquittal based on his belief that petitioner may have been partially motivated by a good faith desire to give legal advice to Goodwin (*id.* at 26a). That conclusion, of course, was fully consistent with the allegation in the present case that petitioner had advised Goodwin to "[p]lease stay out of it" in order to keep his previously retained attorney out of the picture.

[3] We recognize that some courts have indicated that a double jeopardy claim may be cognizable on appeal even if never presented to the trial court. See, *e.g.*, *United States* v. *Gunter*, 546 F. 2d 861, 864-865 (C.A. 5), certiorari denied, 430 U.S. 947; *United States* v. *Anderson*, 514 F. 2d 583, 586 (C.A. 7); *Government of the Virgin Islands* v. *Smith*, 445 F.2d 1089, 1094 (C.A. 3). None of these cases, however, concerned a situation like that present here, which involves a claim of collateral estoppel (an essentially factual matter, unlike other double jeopardy contentions) that the defendant expressly declined to rely on (rather than merely failed to mention) as a ground for relief in the district court. There is no need for the Court to consider the waiver issue, in light of the court of appeals' correct rejection of petitioner's claim on the merits (Pet. App. 10a n.2).

Since none of the false statement charges at petitioner's second trial was dependent on facts resolved against the government at the first trial, there is no merit to petitioner's claim that the court of appeals' decision conflicts with *United States* v. *Nash*, 447 F. 2d 1382 (C.A. 4), and *United States* v. *Hernandez*, 572 F. 2d 218 (C.A. 9), in which perjury convictions following acquittals were found to be barred by collateral estoppel. *Nash* and *Hernandez* involved only the application of the doctrine of collateral estoppel to the specific facts of those cases. Neither case purports to hold that a perjury prosecution may not be instituted following an acquittal at the trial where the perjury occurred. To the contrary, both courts agreed with the court below that collateral estoppel does not bar a subsequent prosecution for perjury following an acquittal unless the factual issue was necessarily adjudicated at the prior trial. *United States* v. *Nash*, *supra*, 447 F. 2d at 1384-1385; *United States* v. *Hernandez*, *supra*, 572 F. 2d at 220.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1746

ALFRED FAYER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Petitioner submits this brief in reply to the government's brief in opposition, primarily to correct misstatements therein on the issues before the Court and to clarify Petitioner's position on those issues.

The government has incorrectly phrased the issue before the Court in such a way as to preclude review thereof. Thus, it states the question presented to be whether the doctrine of collateral estoppel bars the government from prosecuting a defendant for testifying falsely at a criminal trial at which he was acquitted. In simplifying the issue to one of whether it is automatically barred by a prior acquittal from prosecuting a defendant for perjury, the gov-

ernment has phrased a question *not* at issue herein and one which this Court answered long ago in the negative [*United States* v. *Williams*, 341 U.S. 58 (1951)], thus ignoring the only real issues presented, which have as yet never been resolved by this Court. Namely, the extent to which the doctrine of collateral estoppel precludes the government in a subsequent perjury prosecution from relitigating issues already determined by a prior acquittal *and* whether application of that doctrine bars it from using the identical evidence at the second trial. The government's brief addresses neither issue head on.

I.

Because of the conflict among the Circuit Courts, this Court should clarify the extent to which the principle of collateral estoppel governs subsequent prosecutions for perjury following an earlier acquittal.

Having so misstated the issue, the government proceeds to argue that an examination of the court's findings in Petitioner's first trial demonstrate that the issues raised by the four perjury counts had not been previously resolved against the government (Gov't. Br. 5).* In the ensuing analysis of those findings, the government adopts the Second Circuit's "restrictive reading" of this Court's reasoning in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), thus eschewing its warning that such analysis not be made in a "hypertechnical and archaic" manner. *Id.*, at 444. *United States*

* The government also urges in footnote 2 of its brief that this Court should decline jurisdiction under the concurrent sentence doctrine. We note, however, that said doctrine is *not* jurisdictional in nature, but is rather a matter of discretion with the Court. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). Moreover, in the Court's most recent explication of this doctrine, it specifically declined to exercise such discretion, accepted certiorari and decided petitioner's claims on the merits. *Andresen* v. *Maryland*, 427 U.S. 463, 470 n.4 (1976).

v. *Hernandez*, 572 F.2d 218 n.5 (9th Cir. 1978). It proceeds to dissect the first court's findings and to slice into successively smaller portions conduct which was once judged in its entirety and when so judged, resulted in an acquittal.

By way of contrast and in direct conflict with the approach consistently followed by the Second Circuit, Judge Hufstedler of the Ninth Circuit in *Hernandez, supra,* adopted the more flexible rationale urged in *Ashe*. Rather than requiring an exact identity of issues between the former trial and the subsequent perjury prosecution as a predicate for application of the doctrine of collateral estoppel, the court was satisfied there by a mere overlap of issues. In the first prosecution, the defendant, a private attorney hired by the Department of Commerce to provide legal services to minority businessmen, had been charged with over-billing the Government for these services because he had in reality spent "substantially less" time providing legal services than he represented in his billings, in violation of 18 U.S.C. § 1001 (false statements). Although the trial court granted his post-trial motion for a judgment of acquittal, the government subsequently indicted him for perjury growing out of his testimony at the first trial concerning legal services that he claimed to have rendered for two minority businessmen, Iwamasa and Martinez. Iwamasa testified at the prior trial that he attended two to four meetings at which Hernandez and Martinez were present and that the discussions centered on prospective investments rather than legal advice. The government did not produce Martinez. Hernandez, testifying on his own behalf, denied over-billing the government and insisted that the meetings did involve legal matters. He also testified he met with Martinez alone several times and that these meetings were exclusively legal in nature. Obviously crediting Hernandez' version of the facts, the trial court entered a judgment of acquittal. Nevertheless, the prosecution indicted him for perjury, reciting in the indictment that the defendant lied when he testified that he met with Martinez

alone. In reversing the conviction for perjury, the Ninth Circuit reasoned that since Hernandez' explanation of his time spent alone with Martinez was "part of" his defense at the first trial and was thus weighed by the trier of fact, the court "necessarily" had to pass "at least in part" upon the truthfulness of his account, thus precluding the government from prosecuting him for perjury in that testimony. 572 F.2d at 222.

The foregoing discussion demonstrates the flexibility with which the courts in the Ninth Circuit address questions of collateral estoppel. See, also, *United States* v. *Nash*, 447 F.2d 1382 (4th Cir. 1971). Rather than insisting that the issue of the defendant's credibility be the only possible basis for the prior verdict of acquittal, they require only that it be at least a partial predicate therefor. Once that predicate is demonstrated, the government is barred from relitigating the issue of the defendant's credibility in a subsequent perjury prosecution.

By way of contrast, the Court of Appeals for the Second Circuit has given a very narrow and restrictive reading to *Ashe* and has never reversed a conviction on collateral estoppel grounds since that decision. Were the instant case to have arisen in the Ninth Circuit, there can be no doubt that it would have been reversed, since the first trier of fact made findings in the defendant's favor, specifically crediting his testimony.* The conflict in the Circuits is a direct result of the fact that this Court has never decided the rule which should govern prosecutions

*Although the government initially contended that the issue of collateral estoppel was waived with respect to Count 4, it does not press that argument, choosing to argue instead that Petitioner's double jeopardy claim is unsound on the merits (Gov't. Br. at 9). Should this Court decline to reach the merits, it is important to note, as we did in our initial brief, that the Circuit Courts are in conflict on the issue of waiver in a double jeopardy-collateral estoppel context and that the conflict should be resolved by this Court (Pet. Br. 12-13).

for perjury following an acquittal for a substantive offense. Given the growing frequency with which prosecutors indict for perjury following acquittal of the substantive offense, the issue is ripe for adjudication.

II.

This Court should resolve the question of whether a defendant may be prosecuted for perjury on the basis of the same evidence introduced at an earlier trial which resulted in an acquittal.

In its brief in opposition, the government has dealt only with the question of issue preclusion, ignoring entirely the equally important issue of whether it may, consonant with the Double Jeopardy Clause, use in a subsequent perjury prosecution the same evidence introduced in a prior trial which resulted in an acquittal. Nor has this issue ever been addressed by the Supreme Court. Indeed, the only court to rule on the question appears to be the Court of Appeals for the Fifth Circuit, which has resolved it in the negative. See, *e.g.*, *Wingate* v. *Wainwright*, 464 F.2d 209 (1972). The rule in that Circuit is that once a person has been acquitted of a charge against him, no evidence that he did in fact commit the crime may be introduced by the government in any subsequent prosecution, regardless of whether the relitigated issue is one of "ultimate" or "evidentiary" fact in the second prosecution. *Id.*, at 213. Thus, for example, where a defendant has been acquitted of assaulting one female, introduction in a subsequent prosecution for assault of a second female of identification testimony by the first female has been held to violate the collateral estoppel rule. *Blackburn* v. *Cross*, 510 F.2d 1014, *reh. den.*, 517 F.2d 464 (5th Cir. 1975). Similarly, in the retrial of Senator Gurney for, *inter alia*, perjury, the government was barred from eliciting from those of its witnesses who had testified against the defendant in the

earlier trial—which had resulted in a partial verdict of acquittal and a hung jury—any testimony bearing upon issues determined by the acquittal. *United States* v. *Gurney,* 418 F.Supp. 1265 (M.D. Fla. 1976).

No other Circuit, including the Second, appears to have gone as far as the Fifth in its expansive reading of the holding in *Ashe* v. *Swenson, supra.*

The government apparently does not dispute that the evidence adduced against Petitioner at his perjury trial was identical to that introduced at the earlier trial which ended in his acquittal. Nor was there any proof introduced at the second trial which was not available to the prosecution at the first trial. In proceeding against Petitioner a second time on the identical evidence—albeit under the guise of a different section of Title 18—the government has sought and obtained the forbidden second bite of the apple, forcing the defendant to run the gauntlet a second time in contravention of the Fifth Amendment. The rationale for the rule which bars the re-use of such evidence was succinctly stated in *Allen* v. *United States,* 194 Fed. 664, 667 (4th Cir. 1912):

> ". . . it is very hard to imagine any state of things which would justify an indictment for perjury of an acquitted defendant against whom the government offers no other substantial evidence than that which had been before the jury which had found him not guilty. The government and its prosecuting officers should not discredit the verdicts and judgments of its own courts by seeking to induce one jury to find that another gave a wrong verdict upon which is in all material respects the same testimony."

These principles are even more applicable where as here the second prosecution seeks to discredit the judgment of an experienced federal judge. See, also, *Youngblood* v. *United States,* 266 Fed. 795, 797 (8th Cir. 1920).

We urge the Court to adopt this salutory rule as an integral part of the Fifth Amendment's guarantee against double jeopardy and as a safeguard that an already acquitted defendant's rights thereunder will be protected.

CONCLUSION

The within petition for a writ of certiorari should be granted.

Respectfully submitted,

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